STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 11, 2000
v	No. 215612 Ottawa Circuit Court
JOHN EARL VERWEY, Defendant-Appellant.	LC No. 96-019516-FH

Before: Fitzgerald, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to concurrent prison terms of twenty to thirty years. He appeals as of right. We affirm.

I

Defendant argues that the trial court abused its discretion in admitting, under MRE 803A, the statements the eight-year-old complainant made to her mother at approximately 4:00 a.m. the morning after defendant allegedly twice molested her. We disagree.

As a threshold matter, defendant asserts that the prosecution gave him inadequate notice of its intent to use the statements. The court rule requires that "[a] statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement." MRE 803A.

Here, the prosecution made its intent to offer the statement known to defense counsel five days before trial. Contrary to defendant's assertion, we find that five days' notice was sufficient to provide defendant with a "fair opportunity to meet the statement" for several reasons. First, defense counsel was aware that complainant's mother may be a possible witness because complainant testified at defendant's preliminary examination that she told her mother she had been molested. Second, defense counsel should have already been familiar with the mother's

testimony about complainant's statements to her because there were few possible witnesses in this case and the testimony was part of the police report. Therefore, we hold that the prosecution's notice to defendant was made sufficiently in advance of trial to provide defendant with a fair opportunity to prepare to meet the statement.

Turning to the merits of the application of MRE 803A to this case, the evidentiary rule provides the following:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
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> (1) the declarant was under the age of ten when the statement was made;
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> (2) the statement is shown to have been spontaneous and without indication of manufacture;
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> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.

Defendant contests the second element, whether the statements were spontaneously made, and the latter part of the third element, whether the delay between when the event occurred and when complainant made her statements to her mother was excusable "as having been caused by fear or other equally effective circumstance." Because there is case law applying MRE 803A, we decline defendant's suggestion that we look to case law on MRE 803(2) (excited utterances) for guidance on this issue.

For example, in *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996), this Court found that the eight- or nine-month delay before the six-year-old victim reported sexual abuse by the defendant to a county mediator during divorce proceedings did not preclude admission of the statements under MRE 803A for use in prosecution of the defendant for criminal sexual conduct. This Court found that the delay was excusable because of the victim's well-grounded fear of the defendant. *Id.* Moreover, this Court concluded that the trial court did not err in finding that the victim's statements were spontaneous because the mediator testified that the victim made the statements in response to the customary, open-ended questions asked of all children of divorcing parents. *Id.*

Here, complainant testified at trial that defendant told her to keep his conduct a secret. Similarly, at the preliminary examination, complainant testified that she was "too scared" to say anything aloud to defendant while he was touching her. Her mother testified that she asked complainant why she did not tell her about defendant's actions before going to bed and complainant answered, "well, he told me not to and I was scared. He told me it was our secret."

Her mother also testified that the statements were made in response to her instruction to "get back upstairs" to bed and that complainant was upset and crying when she made the statements.

We agree with the trial court that the delay of approximately twelve or thirteen hours between the event and complainant's statements to her mother was excusable as having been caused by complainant's fear. Similarly, we agree with the trial court that complainant's statements were spontaneous because the statements were prompted by an instruction that any parent would make to a child who does not want to return to bed. Therefore, we hold that the trial court did not abuse its discretion in admitting the statements complainant made to her mother under MRE 803A. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

II

Defendant also argues that this case should be remanded because the sentencing court denied him a hearing pursuant to MCL 769.13; MSA 28.1085 to establish whether his 1985 conviction for second-degree criminal sexual conduct, which was used to support the habitual offender conviction, was unconstitutionally obtained.

The existence of a defendant's prior convictions is determined by the court either at sentencing or at a pre-sentencing hearing. MCL 769.13(5); MSA 28.1085(5). A prior conviction may be established by any relevant evidence, including information contained in the presentence report. MCL 769.13(5)(c); MSA 28.1085(5)(c); *People v Green*, 228 Mich App 684, 699; 580 NW2d 444 (1998). Due process is satisfied if the sentence is based on accurate information and the defendant had a reasonable opportunity at sentencing to challenge the information. *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996).

The presentence report listed defendant's 1979 and 1985 convictions for second-degree criminal sexual conduct. The sentencing court not only heard counsel's arguments at sentencing regarding defendant's challenge to his 1985 conviction, but it also adjourned the proceeding and permitted counsel to file memoranda on the topic for the court to review before reconvening to sentence defendant. Therefore, defendant has revealed no abuse of discretion or denial of due process because the trial court was well informed of the basis for defendant's challenge and defendant had a reasonable opportunity to challenge the information. *Williams, supra*.

III

Defendant proffers several reasons in support of his last argument that his sentence is disproportionate, none of which persuade us that his sentence was disproportionate to the seriousness of this crime or his prior record. See *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

The statutory maximum sentence for a conviction of second-degree criminal sexual conduct is fifteen years' imprisonment. MCL 750.520c(2); MSA 28.788(3)(2). Because of defendant's habitual offender status, the court was permitted to sentence defendant to twice the longest term prescribed by law. See MCL 769.11; MSA 28.1083. Hence, the sentence of twenty to thirty years' imprisonment was within the statutory limits.

There is no merit to defendant's assertion that his sentence is based solely on his habitual offender status. As we have previously held, sentence enhancements are based on additional particular acts of convicts; therefore, the statutes do not impermissibly punish status. *People v Curry*, 142 Mich App 724, 732; 371 NW2d 854 (1985).

Additionally, there is no merit to defendant's assertion that his sentence is disproportionate in light of the sentencing range prepared in this case. The judicial sentencing guidelines do not apply to habitual offenders, *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996), and may not be considered on appeal in determining an appropriate sentence for an habitual offender, *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

Last, there is no merit to defendant's assertion that his sentence is disproportionate in light of his criminal record or the circumstances of this case. Defendant had several prior convictions, including the two prior felony convictions that were the basis of his status as a third habitual offender. He committed the instant offense while on parole and apparently had another criminal sexual conduct charge pending against him, too. See *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994) (a court may consider the facts underlying uncharged offenses, pending charges, and acquittals). Therefore, we hold that the trial court did not abuse its discretion in giving a sentence within the statutory limits because defendant has demonstrated an inability to conform his conduct to the laws of society. See *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck